ELECTRONICALLY FILED APR 24, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. LAMAR CHEYEENE WILSON, Defendant-Appellant.	)	S.CT. NO. 18-0564

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
HONORABLE PAUL. D. MILLER, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 24th day of April, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Lamar Wilson, No. 6341416, Fort Dodge Correctional Facility, 1550 "L" Street, Fort Dodge, IA 50501-5767.

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it involves a substantial issue of broad public importance and first impression. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) & (d). Specifically this case addresses the interpretation of recent amendments to Iowa Code chapter 704, including the addition of section 704.13 providing that a person who is justified in the use of deadly force is "immune from criminal and civil liability for damages incurred by the aggressor." This statute has been litigated in criminal cases across the state and has been applied inconsistently. See, e.g., State v. Burton, Polk County FECR312779 (motion to enforce immunity denied without discussion); State v. Henrickson, Polk County FECR312954 (denying pretrial hearing on immunity); State v. Staley, Montgomery County FECR010683 (case dismissed pretrial pursuant to section 704.13); and State v Hodges, Linn County FECR126247 (motion to dismiss denied without hearing). This appeal asks the court to resolve whether

section 704.13 warrants a pretrial evidentiary hearing and to resolve questions of the burden of proof in such a hearing.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Lamar Cheyeene Wilson from his convictions, judgment and sentences for one count of voluntary manslaughter, two counts of assault with intent to cause serious injury, and one count of intimidation with a dangerous weapon following a jury trial in the Johnson County District Court.

Course of Proceedings: The State initially charged Lamar Wilson with one count of first degree murder, two counts of attempted murder, three counts of intimidation with a dangerous weapon, and one count of gang participation. (Trial Information 9/7/17)(App. pp. 6-7). Wilson filed a notice of affirmative defenses, including "self defense, defense of others, defense against a forcible felony, defense of property, and the right to 'stand your ground.' " (Notice of Defenses 9/18/17)(App. p. 10). After discussing the applicability of section 704.13 (2017) in a case management conference,

Wilson filed a motion to dismiss based on statutory immunity in section 704.13 (2017). Wilson argued he was entitled to a judicial determination of immunity from prosecution pursuant to the new legislation. (10/13/17 Hearing Tr. p. 6 L. 18 – p. 10 L. 17; Motion to Dismiss 10/20/17)(App. pp. 11-15).

The State resisted, and ultimately the district court concluded it would not rule on Wilson's motion to dismiss until after trial, relying on the evidence submitted at trial to reach its decision about immunity. (10/27/17 Hearing Tr. p. 2 L. 8 – p. 8 L. 16; 11/2/17 Hearing Tr. p. 21 L. 21 – p. 42 L. 11) (Resistance 10/26/17; Def's Response 10/31/18; State's Supp. Resistance 11/1/17; Ruling 11/3/17)(App. pp. 24-28; 29-35; 36-53; 54-59).

The district court granted a motion to change venue and trial was held in Polk County. (Motion to Change Venue 10/25/17; 11/2/17 Hearing Tr. p. 7 L. 1-16)(App. pp. 18-23). The court also severed the gang participation charge. (Motion to Sever 10/25/17; Ruling 11/17/17; 1/5/18 Hearing Tr. p. 2 L. 21 – p. 4 L. 6; Ruling 1/11/18)(App. pp. 16-17; 60-63; 65).

The State amended the trial information, removing the felony murder alternative of the first degree murder count and removing two counts of intimidation. (Amended Trial Information 1/23/18)(App. pp. 73-76).

Wilson also moved for "necessary remedial measures" pursuant to State v. Plain, 898 N.W.2d 801, 821 (Iowa 2017) alleging that the jury pool violated his Sixth Amendment right to a fair cross section of the community because it underrepresented African-Americans and Hispanics. (Plain Motion 1/19/18) (App. pp. 67-68). The court denied the motion. (1/22/18 Trial Tr. p. 3 L. 19-25; p. 16 L. 6 – p. 17 L. 4).

A jury was selected and trial commenced on January 25, 2018. After the State rested, Wilson moved for judgment of acquittal and renewed his motion for a finding of immunity. The court denied both motions. (2/1/18 Trial Tr. p. 3 L. 7 – p. 11 L. 18).

The jury began deliberations on Friday, February 2, 2018, and on Monday, February 5, the jury sent a question to the

court. (2/2/18 Trial Tr. p. 82 L. 1-8; 2/5/18 Trial Tr. p. 2 L. 3 – p. 5 L. 19). "What is the rule for stand your ground? Does it apply to this case? If so, what does it stand for?" (Jury Question 2/7/18)(App. p. 78). The court responded that the applicable law of justification was in the jury instructions. (Court Response 2/7/18)(App. p. 79). On February 7, 2018, the jury returned verdicts of guilty to the lesser included offense of voluntary manslaughter, guilty to the lesser included offenses of assault with intent to cause serious injury, and guilty as charged to intimidation with a dangerous weapon. (2/7/18 Trial Tr. p. 2 L. 9 – p. 3 L. 9).

After trial, the court ordered the parties submit summaries of the evidence from trial to support their respective positions on the immunity issue and set it for a hearing. (Order 2/9/18; Order 2/12/18)(App. pp. 92; 94). To assist in the preparation of his summary, Wilson requested transcripts of the trial be prepared, but the court denied his request. (Motion for Transcripts 2/13/18; Order 2/16/18) (App. pp. 96-97; 98). The parties submitted their summaries,

and at the hearing Wilson offered the testimony of several witnesses who did not testify at the trial. (2/22/18 Hearing Tr. p. 2 L. 8 – p. 3 L. 5). The court did not allow the witnesses to testify but determined the parties could depose the witnesses and submit the depositions as evidence. (2/22/18 Hearing Tr. p. 3 L. 6 – p. 5 L. 2; p. 13 L. 8 – p. 25 L. 4). After the depositions were submitted, the court ruled it would not hear further argument or evidence and issued a ruling on the merits, denying Wilson's claim of immunity and concluding section 704.13 was void for vagueness. (3/26/18 Ruling; 3/27/18 Ruling)(App. pp. 107-108; 110-117). Wilson moved for reconsideration but was denied. (Motion to Reconsider 3/29/18; 3/30/18 Sentencing Tr. p. 8 L. 1-5)(App. pp. 119-120).

Wilson's motion for a new trial was denied. (Motion for New Trial 3/24/18; 3/30/18 Sentencing Tr. p. 8 L. 6 – p. 22 L. 24)(App. pp. 105-106). The court adjudged Wilson guilty of voluntary manslaughter, a class C forcible felony, in violation of Iowa Code § 707.4; two counts of assault with intent to

cause serious injury, aggravated misdemeanors in violation of Iowa Code §§ 708.1 and 708.2(1); and one count of intimidation with a dangerous weapon with intent, a class C forcible felony in violation of Iowa Code § 708.6. (3/30/18 Sent. Tr. p. 58 L. 10-18). The court sentenced Wilson to a ten year indeterminate term of incarceration for the voluntary manslaughter conviction, two two-year terms of incarceration for the assault convictions, and a ten-year term of incarceration for the intimidation conviction and ordered all sentences to run consecutively. (Sentencing Order 3/30/18) (App. pp. 121-123). The court also imposed a mandatory minimum of five years on the intimidation count pursuant to Iowa Code § 902.7 and the jury's finding that he used a dangerous weapon to commit the offense. (Sentencing Order 3/30/18)(App. pp. 121-123).

Wilson filed a timely notice of appeal. (Notice of Appeal) (App. p. 125).

Facts: Many of the facts were not in dispute. At about 1:15am on August 27, 2017, two groups with a history of

animosity—one from Iowa City and the other from Cedar Rapids—were both present on the pedestrian mall in downtown Iowa City. Lamar Wilson, part of the Iowa City group, was legally carrying a handgun. At least three members of the Cedar Rapids group were also armed. As the Cedar Rapids group walked past the Iowa City group, words were exchanged, and Wilson drew his gun and fired, hitting three people. Two people from Cedar Rapids also drew their weapons. The dispute in the case involved Wilson's motivation and intent for the shooting.

* * *

On August 26, 2017, Daquan Jefferson, or "Cutthroat," was killed in a car accident following a police chase. News of his death traveled on Facebook, and Donte Taylor, from Cedar Rapids, expressed his happiness about it. In 2012, Cutthroat had ridiculed the death of Taylor's cousin, resulting in a longstanding animosity between them. Taylor's comments on Facebook sparked an online feud with Cutthroat's family and friends throughout the morning that culminated in Taylor

posting that he was "war ready." (1/26/18 Trial Tr. p. 185 L. 3 – p. 191 L. 9).

That afternoon Cutthroat's friends and family gathered at Lamar Wilson's house in Iowa City for a vigil. After a noise complaint, the crowd left Wilson's house and gathered on the pedestrian mall downtown. (State's Ex. 4 at 7:00-8:00).

That night, Taylor met with friends at Maxwell Woods' house in Cedar Rapids to watch the Mayweather fight on pay-per-view. (1/26/18 Trial Tr. p. 192 L. 2 - p. 193 L. 7). After the fight ended, the group from Cedar Rapids—Donte Taylor, Maxwell Woods, Xavier Hicks, D'Andre Hicks, Kaleek Jones, Dunte Blair, and "Tall Folks"—went to Iowa City. No one admitted going to Iowa City to confront the friends and family who were mourning Cutthroat: Xavier Hicks said they went because they "always go to Iowa City." D'Andre Hicks and Maxwell Woods said they went to celebrate Mayweather's win. Donte Taylor said they went hang out and go to the strip club, although there was no strip club in Iowa City. (1/26/18 Trial Tr. p. 65 L. 1 - p. 66 L. 15; p. 82 L. 24 – p. 83 L. 5; p. 88 L. 6 –

p. 90 L. 7; p. 131 L. 25 – p. 134 L. 3; p. 194 L. 21 – p. 195 L. 23) (1/29/18 Trial Tr. p. 39 L. 19-22; p. 53 L. 25 – p. 54 L. 3; p. 79 L. 15 – p. 80 L. 9).

Donte Taylor, Dunte Blair and Maxwell Woods were each armed with a handgun. (1/26/18 Trial Tr. p. 195 L. 20 – p. 196 L. 14; 1/29/18 p. 12 L. 23 – p. 14 L. 23). Donte Taylor testified that he carried a gun on his waistband, even though he could not legally possess one, partly because of his interactions on Facebook earlier that day. (1/26/18 Trial Tr. p. 197 L. 3-21). Although Taylor testified that he, Maxwell Woods and Dunte Blair all had weapons and put them on the table at Woods' house while they watched the fight, D'Andre and Xavier Hicks testified that they didn't know anyone else in their group had a gun that night and denied they were carrying weapons. (1/26/18 Trial Tr. p. 75 L. 2-7; p. 87 L. 17 – p. 88 L. 21-20; p. 117 L. 16-22; p. 127 L. 5-16; p. 148 L. 21 – p. 149 L. 15; 1/29/18 Trial Tr. p. 13 L. 4-12).

The group hung out on the pedestrian mall in Iowa City across from the breezeway where Cutthroat's family and

friends were gathered. Several women with the Iowa City group approached them, upset and asking if one of them was Donte and if they said "fuck Cutthroat." No admitted making the statement. Kaleek Jones talked to them, and they seemed to calm down. After he gave them a hug, the women returned to their crowd on the other side of the pedestrian mall. (1/26/18 Trial Tr. p. 66 L. 16 – p. 70 L. 11; p. 134 L. 4 – p. 138 L. 12; p. 159 L. 1-18; p. 199 L. 24 – p. 201 L. 3; 1/29/18 Trial Tr. p. 41 L. 21 – p. 43 L. 8).

Soon after, the Cedar Rapids group walked back through the breezeway, past the Iowa City group. Xaiver Hicks, D'Andre Hicks, and Maxwell Woods testified Wilson asked them if they said "fuck Cutthroat." (1/26/18 Trial Tr. p. 71 L. 13 – p. 72 L. 24; p. 140 L. 17 – p. 141 L. 12; 1/29/18 Trial Tr. p. 44 L. 23 – p. 45 L. 20). D'Andre Hicks was at the back of his group, so he stopped to answer, telling Wilson he didn't know who Cutthroat was when Wilson pulled a gun out of his jacket and started shooting without provocation. (1/26/18 Trial Tr. p. 73 L. 15 – p. 74 L. 25; p. 141 L. 2 – p. 144 L. 18;

1/29/18 Trial Tr. p. 41 L. 12-20; p. 46 L. 3-9). Everyone ran, and Woods testified he fired his own gun twice to scare Wilson as he ran away. (1/29/18 Trial Tr. p. 46 L. 10-21).

Donte Taylor testified he was in the front of his group and heard Wilson ask, "Aren't you the guy who said fuck my dead homie?" Taylor drew his own weapon but denied pointing it at anyone. He heard someone say, "what are you reaching for?" or "why are you doing that?" as he drew his weapon, but didn't think they were talking to him. When he turned around with his gun out, he saw Wilson already had his gun out and pointing at him. Taylor ran and saw Wilson fire his gun. (1/26/18 Trial Tr. p. 203 L. 18 – p. 205 L. 25)(1/29/18 Trial Tr. p. 26 L. 13 – p. 27 L. 6; p. 31 L. 10 – p. 33 L. 7).

Two witnesses who were not part of either group testified they heard arguing before shots were fired, but neither identified any specific words that were used. One saw Wilson shoot. The other saw someone with dreadlocks pull out a

gun.[1] The witness heard, but did not see, shots as he ran away. (1/26/18 Trial Tr. p. 175 L. 4 – p. 178 L. 2; p. 48 L. 7 – p. 54 L. 8).

Wilson ran from the scene and was stopped nearby by Iowa City police officers. A gun was found on the ground near Wilson, and when Wilson told police the gun was his, he was taken to the police station. He explained that he had thrown down his gun when he was detained out of concern for getting shot by police if they saw him with a gun. (1/29/18 Trial Tr. p. 155 L. 16 – p. 167 L. 24; 1/31/18 Trial Tr. p. 71 L. 8 – p. 75 L. 13).

Wilson did not testify. The jury viewed a recording of his interview with police at the station shortly after the shooting. (State's Ex. 4). Wilson was cooperative and told his story voluntarily. He told the police he shot a dark-skinned guy with dreads who pulled out a gun. (State's Ex. 4 at 10:50 – 11:00).

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[1] Wilson does not have dreadlocks and did not on the night of the shooting.

He explained that while he was hanging out on the pedestrian mall near the breezeway, he noticed a group of about six people he didn't recognize looking at him. Some of the women with him—including his own sister, Cutthroat's sister, and Ronnay Creed—had talked to them and told Wilson they were from Cedar Rapids and had guns. He knew Cutthroat had problems with people from Cedar Rapids, and the way they were watching him made his "antennas go right up." (Ex. 4 at 7:00–8:45; 12:00-13:40).

As the Cedar Rapids group walked past, he kept an eye on them, watching their hands and their waistlines. As they walked by, Donte Taylor[2] was in the lead and put his hand to his waist, indicating he had a gun. Wilson's sister was starting to panic, so Wilson asked, "What are you doing?" He motioned to his own jacket where he was carrying his gun.

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[2] Wilson didn't know the names of the people from Cedar Rapids but described them by their hairstyle, skin tone and clothing. Donte Taylor had dreads and was wearing a two-toned blue shirt. D'Andre Hicks also had dreads and was wearing a white and black shirt or jacket. (State's Ex. 4 at 48:00-51:00).

D'Andre Hicks, who was bringing up the rear, motioned to his front pocket. (State's Ex. 4 at 11:10–11:45). He was asking the guy's friend what the other guy was doing with the gun, when D'Andre flashed his gun. Wilson reacted by pulling out his gun and "got to discharging and that's when they got to discharging." He fired four or five times. (State's Ex. 4 at 12:00-13:55).

Wilson described, "It was so scary, it was just such a scary situation." "The look in his face was he was really gonna get to killing everybody." Wilson reacted so fast that he shot first. (State's Ex. 4 at 23:00-23:20; 24:30-25:05). He asked if the guy who "put/pulled the gun on me" was hurt. (State's Ex. 4 at 37:30-37:40). He acknowledged that they did not explicitly threaten him but rather "subliminally" threatened him by motioning to their guns and saying "I wish a motherfucker would." He also thought it odd that they stayed on the pedestrian mall for such a short time. He knew Taylor had his gun on his hip, and as they walked past, Taylor would motion to his gun while eyeing Wilson then look back to his

group. Then D'Andre said, "I wish as motherfucker would." Wilson asked what they were doing, and Taylor turned, walking backwards as if he was getting ready to shoot and run. When asked if Taylor pulled out his gun, Wilson said "Yeah, he had it right in his hand, walking backwards, like he's getting to shooting and run." (State's Ex. 4 at 51:00-55:40).

Towards the end of the interview Wilson learns there were likely surveillance cameras that captured the event, and he is relieved. "Let the cameras show you." (State's Ex. 4 at 55:45 – 58:50).

Physical evidence and recordings that Wilson fired five times and Woods fired twice. Wilson's shots hit Xavier Hicks once, D'Andre Hicks three times, and Kaleek Jones once. Xavier and D'Andre Hicks were treated at the hospital and recovered from their injuries. Kaleek Jones died of his wounds several days later. (1/30/18 Trial Tr. p. 44 L. 4 – p. 55 L. 6; p. 156 L. 24 – p. 157 L. 11; p. 195 L. 15 – p. 196 L. 19; 1/31/18 Trial Tr. p. 41 L. 3 – p. 43 L. 5).

Although Wilson told police D'Andre Hicks flashed a gun, D'Andre Hicks denied having a weapon on him that night because he is a felon and is not permitted to carry a gun. No one else in the group from Cedar Rapids admitted knowing D'Andre was carrying a gun. (1/26/18 Trial Tr. p. 144 L. 7-18; p. 157 L. 20 – p. 158 L. 4; 1/29/18 Trial Tr. p. 24 L. 7-16; p. 45 L. 14 – p. 46 L. 2). There was no dispute that three members of the Cedar Rapids group were armed, but four guns associated with the Cedar Rapids group were found. The extra gun was in a backpack in the backseat of Woods' car. Woods denied any knowledge of the gun. The defense argued that security video showed "Tall Folks" attending to the injured D'Andre and then leaning in the back window of Woods' car, giving him an opportunity to take D'Andre's gun and put in the backpack where it was later found. (1/29/18 Trial Tr. p. 46 L. 24 – p. 50 L. 4; p. 54 L. 10 – p. 58 L. 10; Def. Ex. DD).

ARGUMENT

I. The district court erred in interpreting and applying Iowa Code section 704.13 (2017). The procedure used by the court resulted in a fundamentally unfair trial and an inadequate and unfair immunity hearing.

A. Error Preservation. Wilson consistently sought a pretrial determination of his immunity pursuant to Iowa Code section 704.13 (2017). (Notice of Defenses 9/18/17; 10/13/17 Hearing Tr. p. 6 L. 18 – p. 10 L. 17; Motion to Dismiss 10/20/17; 10/27/17 Hearing Tr. p. 2 L. 8 – p. 8 L. 16; 11/2/17 Hearing Tr. p. 21 L. 21 – p. 42 L. 11; 2/1/18 Trial Tr. p 3 L. 7 – p. 11 L 18)(App. pp. 10; 11-15). The district court denied Wilson's request pretrial and determined it would make an immunity ruling post trial after considering the evidence at trial. (2/1/18 Trial Tr. p 3 L. 7 – p. 11 L. 18) (Ruling 11/3/17)(App. pp. 54-58). The district court later determined the statute was unconstitutionally vague and unenforceable because it did not describe the procedure that should be used to enforce a claim of immunity. (Ruling 3/27/18)(App. pp. 110-118).

B. Standard of Review. Because this issue involves a question of statutory interpretation, the appellate court will review the district court's interpretation for correction of errors at law. State v. Childs, 896 N.W.2d 177, 184 (Iowa 2017). On Wilson's claim that he was denied a fair trial, review is de novo. Lado v. State, 804 N.W.2d 248, 251 (Iowa 2011).

C. Discussion. House File 517, "an act relating to offensive and dangerous weapons, and the justifiable use of reasonable and deadly force" was signed into law in the spring of 2017 and went into effect on July 1, 2017. Included in the bill were amendments to Chapter 704 addressing the justifiable use of force. The bill altered the definition of "reasonable force," removing any duty to retreat if the person is lawfully present and not engaged in illegal activity. Iowa Code § 704.1 (2017). As well, the bill added a new section titled "Immunity."

> A person who is justified in using reasonable force against an aggressor in defense of oneself, another person, or property pursuant to section 704.4 is immune from criminal or civil liability for

> all damages incurred by the aggressor pursuant to the application of reasonable force.

Iowa Code § 704.13 (2017).

Wilson argued section 704.13 granted him immunity from trial if he could establish to the court his actions were justified. The district court denied Wilson the opportunity to establish his immunity before trial, and instead held it would consider the evidence at trial to make the determination. Later the court concluded Wilson had not met his burden and that the statute was unconstitutionally vague and unenforceable. (3/27/18 Ruling)(App. pp. 110-118).

The district court erred in concluding section 704.13 did not provide for a pretrial determination of immunity when a defendant claims justification. The immunity provision necessarily requires a determination be made before trial, and this court should conclude, as have the courts in many other states, the proper procedure is an evidentiary hearing in which the Defendant must establish by a preponderance of the evidence that he was justified. Because the procedure utilized

and the evidence considered by the court in this case was insufficient under the statute and violated Wilson's right to a fair trial, his convictions should be vacated and his case remanded to the district court for further proceedings.

1. *Section 704.13 provides for immunity from trial.* "When the text of a statute is plain and its meaning clear, the court should not search for a meaning beyond the express terms of the statute." State v. Iowa Dist. Ct., 902 N.W.2d 811, 815 (Iowa 2017). The language of section 704.13 provides that a person who is justified in his use of reasonable force is "immune from criminal or civil liability for all damages incurred by the aggressor." Iowa Code §704.13 (2017). Statutes throughout the Iowa Code providing for "immunity from criminal or civil liability" have routinely been interpreted to provide for a pretrial determination of whether the immunity applies.

For example, when applying the immunity provision in section 232.73 providing certain persons "shall have immunity from any liability, civil or criminal, which might otherwise be

incurred or imposed," the Iowa Supreme Court noted that "[t]he purpose of [statutory] immunity is to remove the fear of litigation for those" whom the statute protects. Nelson v. Lindaman, 867 N.W.2d 1, 7 (Iowa 2015).

> Section 232.73 provides a form of qualified immunity. Qualified immunity is a question of law for the court and the issue may be decided by summary judgment. Summary judgment is an important procedure in statutory immunity cases *because a key purpose of the immunity is to avoid costly litigation, and that legislative goal is thwarted when claims subject to immunity proceed to trial.* Indeed . . . we recognized the defendants' observation that statutory immunity, like common-law immunity, provides more than protection from liability; it provides protection from even having to go to trial in some circumstances. Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation.

Nelson, 867 N.W.2d at 7 (internal citations and quotations removed)(emphasis added).

In the criminal context, the Iowa Supreme Court has considered whether the same immunity statute would prevent criminal prosecution for child endangerment when the abuser later cooperates with the investigation. See State v. King, 434

N.W.2d 627, 629 (Iowa 1989). In King, the court concluded the immunity provision only protected against criminal prosecution for crimes related to the act of reporting or cooperating itself, not the underlying child abuse that was the subject of the investigation. Id. Notably, the court's discussion and holding implicitly recognized that the statute's immunity provision would provide for protection from prosecution, not merely provide a defense for trial. Id.

However if section 704.13 is ambiguous, the court will apply the rules of statutory construction. State v. Iowa Dist. Ct., 902 N.W.2d 811, 815 (Iowa 2017). "To ascertain the legislature's intent, we will assess 'the statute in its entirety, not just isolated words or phrases,' and we will seek to interpret it so that no part of it is rendered redundant or irrelevant." State v. McCullah, 787 N.W.2d 90, 94 (Iowa 2010) (quoting State v. Gonzalez, 718 N.W.2d 304, 308 (Iowa 2006)). The court will seek "a reasonable interpretation that best achieves the statute's purpose and avoids absurd results." Id. "Legislative intent is ascertained not only from the language

used but also from the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." Id., at 94-95 (internal quotations removed). See Iowa Code §4.6 (2017).

Certainly the overall intent of the legislature in enacting HF517 was to expand the rights of and enhance the protections available to lawful gun owners in Iowa. Considering chapter 704 as a whole and the amendments made in HF517, it is clear the legislature intended to do more than merely provide an affirmative defense of justification. Such an affirmative defense already existed in sections 704.1 through 704.6. In the same legislation, several of those provisions were amended to change the definition of reasonable force and to eliminate the duty to retreat under certain circumstances. However, the legislature also added an entirely new section providing for immunity from criminal liability. This demonstrates an intent to create a new remedy that wasn't previously available—the ability of a defendant to

avoid civil or criminal trial if he causes harm to another when acting to protect himself or others from a threat. Any other reading renders the section superfluous.

The district court expressed concern about the statute's reference to immunity from liability "for all damages incurred by the aggressor," concluding it was ambiguous and could refer to "anything from court costs associated prosecution, to fines, to restitution, to simply being prosecuted at all." (3/27/18 Ruling, p. 7)(App. p. 116). The court's concern is unwarranted. The legislature's use of broad language does not make the statute ambiguous—rather it indicates the legislature intended broad application. Further, in a criminal case, a person may not be liable for damages, in the form of fines or costs or restitution, until that person has been subjected to a criminal prosecution and convicted of a crime.

Thus, a consideration of the language used as well as the statute's subject matter and object sought to be accomplished, demonstrates section 704.13 establishes the opportunity for "immunity"—for a pretrial determination of justification and

the chance to avoid trial upon a showing that a defendant was justified in his use of reasonable force.

2. *The promise of immunity entitles a defendant to a pretrial evidentiary hearing.* The district court concluded that although section 704.13 provided for "immunity," it did not specify the procedure by which a defendant could assert that immunity. Although the statute does not explicitly describe the procedure to be utilized, courts in other states with similar immunity provisions provide guidance for a fair and workable procedure.

Between 2005 and 2014, "upwards of twenty states have passed . . . "Stand Your Ground" statutes containing provisions for criminal immunity, civil immunity, or both, for persons 'justified' in using force." Jennifer Randolph, "How To Get Away With Murder: Criminal and Civil Immunity Provisions in 'Stand Your Ground' Legislation, 44 Seton Hall L. Rev. 599, 600, fn. 10 (2014) (identifying statutes). Most of these statutes provide for civil immunity, but many also provide for criminal immunity similar to section 704.13. Also,

like section 704.13, most of those criminal immunity statutes do not explicitly describe the procedure to be used when a defendant asserts immunity. Nonetheless, courts in Colorado, South Carolina, Georgia, Alabama, and Florida have concluded, absent explicit guidance from their legislatures, that the proper procedure involves a pretrial evidentiary hearing in which the defendant bears the burden of proving immunity by a preponderance of the evidence. See People v. Guenther, 740 P.2d 971, 975-980 (Colo. 1987)(holding defendant was entitled to a pretrial hearing in which defendant must establish immunity by a preponderance of the evidence to give effect to immunity statute); State v. Duncan, 709 S.E.2d 662, 664–65 (S.C. 2011) (same); Bunn v. State, 667 S.E.2d 605, 608 (Ga. 2008) (same); State v. Watson, 221 So.3d 497, 502-504 (Ala. Ct. App. 2016) (same); Bretherick v. State, 170 So.3d 766, 775 (Fla. 2015) (same).[3] The Wisconsin

[3] The Florida legislature has since amended its immunity statute to expressly provide for a different burden of proof. See Langel v. State, 255 So. 3d 359, 361 (Fla. Dist. Ct. App. 2018).

Court of Appeals concluded similarly about a statute providing for criminal immunity for certain crimes for a person who aids another suffering from a drug overdose. See State v. Williams, 888 N.W.2d 1, 4-6 (Wis. App. 2016)(defendant asserting immunity under statute has right to pretrial determination and has burden of preponderance of the evidence). Kansas and Kentucky courts have settled on a different burden of proof based on specific language found in their immunity statute. See State v. Ultreras, 295 P.3d 1020 (Kan. 2013) (establishing pretrial procedures in but applying a probable cause standard of proof for the defendant); Rodgers v. Com., 285 S.W.3d 740, 755 (Ky. 2009) (providing that immunity statute required pretrial determination of immunity but holding Commonwealth bore burden of establishing probable cause that defendant is not justified pursuant to specific language in the immunity statute).

Pretrial evidentiary hearings are not new to trial courts and are routinely conducted when defendants raise motions to suppress or assert a prosecution is barred by the statute of

limitations, speedy trial limitations or double jeopardy concerns. See Guenther, 740 N.W.2d at 977; Bunn, 667 S.E.2d at 608.

These courts have determined the burden is appropriately placed on the defendant, absent explicit guidance from the statute, because the remedy of dismissal and bar to prosecution is an "extraordinary protection" and more valuable than a mere right to raise an affirmative defense at trial. See Guenther, 740 N.W.2d at 980; Bunn, 667 S.E.2d at 608. The Colorado court noted the "constitutionally significant difference in kind between requiring a defendant, on the one hand, to bear the burden of proving a claim of pretrial entitlement to immunity from prosecution and, on the other, to carry the burden of proof at trial on an affirmative defense to criminal charges." Guenther, 740 N.W.2d at 980. "Furthermore," the court reasoned, a defendant "presumably has a greater knowledge of the existence or nonexistence of the facts which would call into play the protective shield of the statute and, under these circumstances, should be in a better

position than the prosecution to establish the existence of those statutory conditions which entitle him to immunity." Id. at 980. As well, it is not uncommon for defendants to bear a burden to establish grounds for dismissal under other circumstances, such as dismissal or suspension of proceedings due to incompetency. Bunn, 667 S.E.2d at 608. See State v. Lyman, 776 N.W.2d 865, 874 (Iowa 2010)("The defendant has the burden of proving his or her incompetency to stand trial by a preponderance of the evidence.")(overruled on other grounds by Alcala v. Marriott Inter. Inc., 880 N.W.2d 669 (Iowa 2016)).

The reasoning of these other courts addressing the same issue is sound and should be adopted by this court interpreting the necessary procedure to enforce section 704.13. Additionally, given that these court decisions predate the passage of HF517, it is likely this procedure is precisely the sort contemplated by the legislature when it created enacted the immunity provision.

3. *The procedure utilized by the district court resulted in both an inadequate and unfair immunity hearing that did not satisfy section 704.13 and a fundamentally unfair trial violating Wilson's due process rights under the U.S. and Iowa Constitutions.* Wilson was entitled to a pretrial evidentiary hearing. The district court denied him that opportunity and instead determined it would consider Wilson's immunity claim after trial, "based on the Court's interpretation and consideration of the evidence," and applying a preponderance of the evidence standard with the burden on Wilson. (Ruling 11/3/17; Ruling 3/27/18)(App. pp. 54-59; 110-118). After the State rested, when Wilson renewed his motion to for immunity, the court denied the motion.

> [W]e will send the jury out. We'll get a jury verdict. If the verdict is not guilty, then we're done. And if the verdict is something other than not guilty, you then will get a chance to make any record that you wish on this issue, especially in light of the fact that we now have a factual record to supplement. And so that's how we're going to proceed with this.

(2/1/18 Trial Tr. p. 10 L. 24 – p. 11 L. 8).

After the jury rendered its verdicts, the court requested summaries of the evidence supporting their respective positions but denied Wilson the opportunity to have a transcript prepared to ensure accuracy. (Motion for Transcripts 2/13/18; Order 2/16/18)(App. pp. 96-97; 98-99). At a hearing, Wilson offered the testimony of several witnesses whom he did not call for trial. (2/22/18 Hearing Tr. p. 2 L. 8 – p. 3 L. 5). The court reminded defense counsel it had not intended to accept further evidence and the State agreed that it had understood the same. The court ultimately allowed Wilson to submit depositions of two additional witnesses. (2/22/18 Hearing Tr. p. 3 L. 6 – p. 5 L. 2; p. 13 L. 8 – p. 25 L. 4; 3/26/18 Ruling)(App. pp. 107-109). After the depositions were submitted, the court ruled it would not take any further argument or evidence and issued a ruling on the merits, denying Wilson's claim of immunity and concluding section 704.13 unconstitutionally vague. (3/26/18 Ruling; 3/27/18 Ruling)(App. pp. 107-109; 110-118).

a. Wilson's trial was fundamentally unfair.

The court's procedure in this case subjected Wilson to a fundamentally unfair and flawed trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Iowa Constitution. His convictions should be vacated and his case remanded for a new trial.

Wilson was subjected to a trial with two different factfinders, answering two different questions with two different burdens of proof.[4] In these circumstances, Wilson and his attorneys were forced to make strategic decisions about how to defend against four separate charges by the State but at the same time bear a burden to prove to the court that Wilson's actions were justified. Wilson was not free to defend against the State's charges in the way he saw fit, but

[4] Even when raising an affirmative defense of justification or self-defense, a defendant bears no burden of proof against the criminal charges. State v. Vick, 205 N.W.2d 727, 731 (Iowa 1973)("When the accused interposes the defense of self-defense, the burden is upon the State to prove beyond a reasonable doubt that defendant was not acting in self-defense.").

instead was forced to compromise his trial strategy by having to bear a burden to prove a separate issue to the court at the same time. Every facet of Wilson's trial was affected by the dual purposes at play. A criminal trial is filled with strategic considerations that are altered depending on the audience (lay jury or court), the factual and legal questions to be resolved, and where the burden is placed: whether to call any witnesses, whether the defendant should testify, whether to call witnesses who have favorable testimony but are subject to impeachment for a variety of reasons, what questions to ask of the State's witnesses, whether and when to object to inappropriate evidence or questions from the State, whether to independently introduce evidence, and even subtleties such as what tone to use when objecting, questioning witnesses, or making opening and closing statements.

A trial under such circumstances is fundamentally unfair and the court's unconstitutional procedure constituted structural error. Structural errors are errors "affecting the framework within which the trial proceeds." Arizona v.

Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265 (1991); Lado v. State, 804 N.W.2d 248, 252 (Iowa 2011). "When structural error is present, no specific showing of prejudice is required as the criminal adversary process itself is presumptively unreliable." Lado, 804 N.W.2d at 252 (internal quotations omitted).

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." For the same reason, a structural error "def[ies] analysis by harmless error standards."

Weaver v. Massachusetts, 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (2017).

The Weaver court identified three situations in which structural error has been recognized: 1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; 2) "if the effects of the error are simply too hard to measure"; and 3) if

the error always results in fundamental unfairness." Weaver, 137 S. Ct. at 1908, 198 L. Ed. 2d 420.

> These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. For these purposes, however, one point is critical: *An error can count as structural even if the error does not lead to fundamental unfairness in every case.*

Id. (emphasis added).

The procedure used by the court in this case is appropriately considered structural error because the effects of the error are simply too hard to measure and always result in fundamental unfairness. It is impossible to examine every subtle aspect of trial and determine whether and when Wilson's trial strategy was comprised by his contemporaneous burden to prove to the court that he was entitled to immunity. Accordingly, Wilson does not have a burden to prove he was prejudiced by the trial proceeding and he is entitled to a new trial.

Wilson, like any criminal defendant, is constitutionally entitled to a trial in which he has no burden of proof, in which

he can sit back and put on no evidence and entirely rely on the State's obligation to prove his guilt beyond a reasonable doubt. However in this trial, Wilson had to prove he was justified by a preponderance of the evidence, so he had an affirmative obligation to provide a certain amount of evidence—he had to put in evidence of his own and cross-examine the State's witnesses in an attempt to undercut their testimony for the State or to elicit testimony to build his case for the judge. Each time he was forced to do that, he faced risk—risk that the witnesses will answer differently than expected or will further reinforce the State's case. Those decisions about how to take those risks should be made only with a consideration of the appropriate burden on a defendant—none.

In this case, counsel strenuously and repeatedly requested a separate pretrial hearing to determine Wilson's immunity from trial. However, after the district court concluded it would hold the immunity hearing and trial at the same time, defense counsel did not specifically object that

such a procedure violated Wilson's right to a fair trial. If the court concludes this failure to further object was insufficient to preserve error on the issue, Wilson asserts his attorneys were ineffective in violation of his Sixth Amendment and article I, section 10 rights to counsel.

To establish an ineffective assistance of counsel claim, the defendant must show that trial counsel breached an essential duty and that prejudice resulted from the breach. State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To satisfy the breach prong, a defendant must show his counsel's performance fell "below the standard demanded of a reasonably competent attorney." Ledezma v. State, 626 N.W.2d 134, 142 (Iowa 2001). Normally, to show prejudice a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Thorndike, 860 N.W.2d 316, 321 (Iowa 2015). "A reasonable probability is a probability sufficient to undermine confidence

in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. However, if the court concludes the procedure utilized in this case was structural error, relieving Wilson of the burden of showing prejudice, then if Wilson's trial counsel breached a duty by failing to object to the procedures, Wilson is also relieved of the burden of showing prejudice on the ineffective assistance of counsel claim under the Iowa Constitution. Krogmann v. State, 914 N.W.2d 293, 325 (Iowa 2018). Accordingly, this court should vacate Wilson's convictions and remand his case for a new trial.

b. The immunity hearing was unfair and insufficient. The district court denied Wilson the right to establish his immunity and avoid trial. However, even though the court considered Wilson's immunity claim after trial, the procedures used and the limitations placed on the evidence and argument considered by the court rendered the hearing unfair and inadequate to satisfy section 704.13, and Wilson is entitled to a new hearing.

Many of the same considerations discussed above rendering his trial unfair also affected the fairness of the immunity hearing. He bore a burden to prove by a preponderance of the evidence he was justified and immune from criminal liability to a judge at the same time and with the same evidence and argument considered by lay jury to determine his guilt or innocence on four criminal charges, including a count of first degree murder. Considerations such as what evidence to submit, what questions to ask, what witnesses to call, and whether Wilson should testify were undoubtedly impacted by his awareness that the lay jury was using the same evidence to decide his fate on the criminal charges. After trial, the court denied Wilson's request to supplement the record with the testimony of three additional witnesses, instead limiting him to the submission of depositions. While the district court requested each party submit a summary of relevant testimony from trial, the court refused to provide access to a transcript of the trial (consisting of eight days of testimony) instead forcing Wilson to rely on

memory to create the summary. And finally, the court cut off further argument after the depositions were submitted. 2/22/18 Hearing Tr. p. 2 L. 8 – p. 5 L. 2; p. 13 L. 8 – p. 25 L. 4) (Motion for Transcripts 2/13/18; Order 2/16/18; Ruling 3/26/18)(App. pp. 96-97; 98-99; 107-109).

This procedure was flawed and unreasonably restricted Wilson's ability to prove he was justified as a matter of law and immune from trial. It does not satisfy section 704.13 and allow Wilson a fair opportunity to establish his immunity. Because Wilson was entitled, under the statute, to a fair, pretrial, evidentiary hearing, his case should be remanded for further proceedings.

D. Conclusion. Iowa Code section 704.13 provides for immunity from trial for a criminal defendant who can establish by a preponderance of the evidence that his actions were justified. The district court erred in concluding otherwise and refusing to hold a pretrial evidentiary hearing. Further, Wilson's due process right to a fair trial was violated by the procedure utilized by the district court, and Wilson is entitled

to both a pretrial evidentiary hearing under section 704.13 and a new trial.

II. If the court concludes the procedure used by the district court does not warrant and new trial and immunity hearing, the district court erred in concluding Wilson had not established he was justified in his use of force and was immune from criminal liability for his actions.

A. Error Preservation. Error was preserved when the district court ruled against Wilson by concluding Wilson had not established, by a preponderance of the evidence, that he was justified when he fired his weapon on August 26, 2017. (3/27/18 Ruling)(App. pp. 110-118). See State v. Lovig, 675 N.W.2d 557, 562 (Iowa 2004). Wilson moved for reconsideration and it was denied. (3/30/18 Sentencing Tr. p. 8 L. 1-5) (Motion to Reconsider)(App. pp. 190-120).

B. Standard of Review. Motions to dismiss are generally reviewed for correction of errors at law. State v. Gonzalez, 718 N.W.2d 304, 307 (Iowa 2006).

C. Discussion. Section 704.13 provides that if a person "is justified in using reasonable force against an aggressor in

defense of oneself [or] another person," he is immune from criminal liability. Iowa Code § 704.13 (2017).

> 1. "Reasonable force" means that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat.
> 2. A person may be wrong in the estimation of the danger or the force necessary to repel the danger as long as there is a reasonable basis for the belief of the person and the person acts reasonably in the response to that belief.
> 3. A person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as specified in this chapter.

Iowa Code § 704.1 (2017).

Wilson established by a preponderance of the evidence he used reasonable force when he fired at the group from Cedar Rapids. Evidence at trial showed that three members of the Cedar Rapids group were armed that night and two of them drew their weapons. (1/26/18 Trial Tr. p. 195 L. 20 – p. 197 L. 21; 1/29/18 p. 12 L. 23 – p. 14 L. 23). Donte Taylor admitted

he had his gun drawn before Wilson fired his weapon. (1/26/18 Trial Tr. p. 203 L. 18 – p. 205 L. 25; 1/29/18 Trial Tr. p. 26 L. 13 – p. 27 L. 6; p. 31 L. 10 – p. 33 L. 7).

Wilson's statement to the police, made shortly after the shooting and before he had a chance to see any surveillance video of the scene or compare his version of events with anyone else, matched in significant respects with the testimony of the Cedar Rapids group. He correctly told police that Donte Taylor had a gun in his waistband. (State's Ex. 4 at 11:10–11:45; 51:00-55:40).

The critical discrepancy was whether D'Andre Hicks was armed and flashed his gun, prompting Wilson to pull his weapon and fire. No one from Cedar Rapids admitted D'Andre was carrying a gun that night, but Wilson effectively undermined their testimony. D'Andre and Xavier claimed to have no knowledge that anyone from the group was carrying weapons that night, even though Woods and Taylor both admitted they were armed and they had put their guns in plain sight earlier in the evening. As well, an extra gun was

found in Woods' car—yet Maxwell denied any knowledge of it. Surveillance video showed that Tall Folks was with D'Andre after he was shot and that he leaned into open rear window of Wood's car, the very place where the extra gun was found. (1/26/18 Trial Tr. p. 144 L. 7-18; p. 157 L. 20 – p. 158 L. 4; 1/29/18 Trial Tr. p. 24 L. 7-16; p. 45 L. 14 – p. 46 L. 2; p. 46 L. 24 – p. 50 L. 4; p. 54 L. 10 – p. 58 L. 10; Def. Ex. DD).

Donnay Creed and Iamani Smith both testified, via deposition, they saw D'Andre point a gun at Wilson that night, putting them in fear. (3/13/18 Ronnay Creed Depo. p. 3 L 2 – p. 4 L. 16; 3/2/18 Iamani Smith Depo. p. 3 L. 14 – p. 5 L. 1).

Thus, Wilson established that was confronted by a group of armed men who were threatening him and his friends. They ultimately flashed their weapons and Wilson reacted by pulling out his own gun and firing repeatedly. He was justified in using deadly force to repeal the similar threat of deadly force. His fear was reasonable, his reaction was reasonable, and the force he used was reasonable.

D. Conclusion. The district court erred in concluding Wilson was not justified and not entitled to immunity for his actions. Wilson's convictions should be vacated and his case remanded for dismissal.

III. The evidence was insufficient to support the verdict that Wilson was not justified in his actions.

A. Error Preservation. Error was preserved when, at the close of the state's case in chief, Wilson moved for judgment of acquittal on the basis that the evidence was insufficient to support a jury finding that he was not justified. The district court denied the motion. (2/1/18 Trial Tr. p. 3 L. 7 – p. 11 L. 18). Wilson renewed his motion after the defense rested and again in his motion for new trial. (2/1/18 Trial Tr. p. 18 L. 6-15; Motion for New Trial)(App. pp. 105-106).

B. Standard of Review. The appellate court will review challenges to the sufficiency of the evidence for corrections of errors at law. State v. Bash, 670 N.W.2d 135, 137 (Iowa 2003).

C. Discussion. The burden is on the State to prove every fact necessary to constitute the offense with which a

defendant has been charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). To withstand a sufficiency of the evidence challenge, a jury's verdict of guilt must be supported by substantial evidence. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984). The appellate court will view the evidence in the light most favorable to the State, but will consider all the evidence presented at trial and not just the evidence supporting the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The evidence presented at trial must raise a fair inference of guilt on every element and do more than create speculation, suspicion, or conjecture. State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992). Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt. State v. Truesdell, 679 N.W.2d 611, 618–619 (Iowa 2004).

Each of Wilson's four convictions required the State to prove that Wilson was not justified. (Jury Instr. Nos. 23, 29, 32, 34)(App. pp. 83-86). However, even viewing the evidence in the light most favorable to the State, the evidence is insufficient to prove that Wilson was not justified when he fired into the Cedar Rapids group. The undisputed evidence shows that Cutthroat died in the early morning hours of August 26 and news of his death spread on Facebook. (1/26/18 Trial Tr. p. 185 L. 3 – p. 191 L. 9). His friends and family mourned him that day with a vigil at Lamar Wilson's house and later the group gathered on the pedestrian mall in Iowa City. Lamar Wilson was carrying a licensed, legal firearm. (State's Ex. 4 at 7:00-8:00).

After midnight, a group of people from Cedar Rapids came to the Iowa City pedestrian mall. At least three of them were armed, and one of them—Donte Taylor—had threatened on Facebook that he was "ready for war" with the friends and family of Cutthroat. (1/26/18 Trial Tr. p. 185 L. 3 – p. 191 L. 9).

As the Cedar Rapids group walked past Wilson and his group, Wilson asked them if they said "fuck Cutthroat." (1/26/18 Trial Tr. p. 71 L. 13 – p. 72 L. 24; p. 140 L. 17 – p. 141 L. 12; 1/29/18 Trial Tr. p. 44 L. 23 – p. 45 L. 20). D'Andre Hicks was at the back of his group, so he stopped to answer, telling Wilson he didn't know who Cutthroat was when Wilson pulled a gun out of his jacket and started shooting. (1/26/18 Trial Tr. p. 73 L. 15 – p. 74 L. 25; p. 141 L. 2 – p. 144 L. 18; 1/29/18 Trial Tr. p. 41 L. 12-20; p. 46 L. 3-9). Everyone ran, and Woods testified he fired his own gun twice to scare Wilson as he ran away. (1/29/18 Trial Tr. p. 46 L. 10-21).

Donte Taylor heard someone say "what are you reaching for?" as he drew his own weapon. When he turned around he saw Wilson had his gun out. As Taylor ran away, he saw Wilson fire his gun. (1/26/18 Trial Tr. p. 203 L. 18 – p. 205 L. 25)(1/29/18 Trial Tr. p. 26 L. 13 – p. 27 L. 6; p. 31 L. 10 – p. 33 L. 7).

Wilson admitted he fired first, but claimed that he did so because the Cedar Rapids group threatened him and flashed their weapons. It was a scary situation—Wilson was outnumbered and outgunned, and his reaction was reasonable. (State's Ex. 4 at 23:00-23:20; 24:30-25:05).

D. Conclusion. Viewing the evidence in the light most favorable to the verdict, there was not sufficient evidence for a reasonable juror to conclude Wilson was not justified under these circumstances, and the district court erred in denying Wilson's motion for judgment of acquittal. Wilson's convictions should be vacated and his case remanded for dismissal.

IV. The district court erred by denying Wilson's motion for a new trial on the voluntary manslaughter and assault charges because the district court findings regarding Wilson's intent were inconsistent with the jury's verdicts for voluntary manslaughter and assault with intent to cause serious injury.

A. Error Preservation. Error was preserved by Wilson's motion for new trial citing Rule 2.24 and arguing that the verdict was against the weight of the evidence. (Motion for

New Trial)(App. pp. 105-106). The district court explicitly addressed whether the verdict was against the weight of the evidence, noting that it could re-weigh the evidence and consider the credibility of witnesses. The court articulated its own findings of fact and denied the motion. (Sentencing Tr. p. 20 L. 8 – p. 22 L. 13).

B. Standard of Review. The appellate court will review a district court's denial of a motion for new trial for an abuse of discretion. State v. Nitcher, 720 N.W.2d 547, 559 (Iowa 2006).

C. Discussion. When ruling on Wilson's immunity claim, the court concluded the evidence from trial and offers of proof submitted post trial "do not support a conclusion that the Defendant was justified in the force he used in this incident, or that the force he used was reasonable force." (3/27/18 Ruling, p. 6)(App. p. 115). The court's factual findings were as follows:

> The undisputed evidence and testimony presented at trial and the offers of proof clearly establish that Defendant indiscriminately discharged a dangerous

> weapon . . . five times into a crowd or assembly of people on a busy and crowded downtown Iowa City pedestrian mall . . . striking three unarmed individuals, including Kaleek Jones, who was shot in the back and subsequently died from his gunshot wounds. Notably, Lamar Wilson never testified that any individual pointed a firearm at him before he fired (as opposed to his sister's and girlfriend's testimony).

(3/27/18 Ruling)(App. p. 115).

When the court denied Wilson's motion for new trial, the court reiterated its findings:

> In my post-trial immunity ruling . . . I made specific findings of fact concerning witness testimony, *including that the evidence clearly established that the Defendant indiscriminately discharged a dangerous weapon five times into a crowd or assembly of people in a busy and crowded downtown Iowa City pedestrian mall* striking three unarmed individuals, included Kaleek Jones who was shot in the back and subsequently died from his wounds.
>
> *I'm staying with those findings* in that conclusion applying the standard set forth in State v. Mendoza-Ortega. I do not find the verdict is contrary to the weight of the evidence or that a miscarriage of justice occurred with the jury verdict.

(Sentencing Tr. p. 21 L. 24 – p. 22 L. 13)(emphasis added).

The Supreme Court has determined that "contrary to evidence" means "contrary to the weight of the evidence."

State v. Ellis, 578 N.W.2d 655, 659 (Iowa 1998). Weight of the evidence refers to a determination by the trier of fact "that a greater amount of credible evidence supports one side of an issue or cause than the other." Id. at 658 (quoting Tibbs v. Florida, 457 U.S. 31, 37-38, 102 S.Ct. 2211, 2216, 72 L.Ed.2d 652, 658 (1982)).

"A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain a verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner." Id. at 658-59 (quoting Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000)). Because a trial court's power is much broader to prevent a miscarriage of justice, the court may weigh the evidence and the credibility of the witnesses. State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003); State v. Ellis, 578 N.W.2d at 658-59 (quoting 3 Charles A. Wright, Federal Practice and Procedure, § 553, at 245-48 (2d ed. 1982)). If the court concludes that

the verdict is contrary to the weight of the evidence, the verdict may be set aside. State v. Ellis, 578 N.W.2d at 658-59.

The findings articulated by the district court—that Wilson "indiscriminately discharged a dangerous weapon five times into a crowd or assembly of people" are incompatible with the jury's verdicts for voluntary manslaughter and assault with intent to cause serious injury. The verdict for voluntary manslaughter required a finding that Wilson "intentionally shot Kaleek Jones." (Jury Instr. No. 23). The verdicts for assault with intent to cause serious injury required findings that Wilson committed an act "intended to cause pain or injury to" Xavier and D'Andre Hicks. (Jury Instr. Nos. 29, 32)(App. pp. 84, 85).[5] The district court's findings that Wilson shot indiscriminately indicate the court did not

[5] The State argued that even if Wilson intended to shoot someone who had a gun in the Cedar Rapids group, his intent to shoot the armed person would support the intent to shoot Kaleek Jones required for the murder charges. (2/2/18 Trial Tr. p. 22 L. 7-17). The jury also received an instruction on transferred intent. (Instr. No. 47)(App. p. 91). However, even applying the transferred intent doctrine, the jury was still required to find that Wilson intended to shoot a specific person.

find Wilson intentionally shot or intentionally sought to cause fear in any particular person. Indiscriminate means "not marked by careful distinction : deficient in discrimination and discernment" or "haphazard, random." "Indiscriminate," Merriam-Webster, found at https://www.merriam-webster.com/dictionary/indiscrimate. Accordingly, the district court should have granted Wilson's motion as to the voluntary manslaughter and two assault convictions.

D. Conclusion. Because the district court erred in denying Wilson's motion for new trial on the voluntary manslaughter and assault convictions, Wilson's case should be remanded for a new trial on these counts.

V. The district court erred in denying Wilson's motion for "necessary remedial measures" to ensure Wilson's right to a jury made up of a fair cross section of the community pursuant to the Sixth Amendment and article 1, section 10.

A. Error Preservation. Error was preserved by Wilson's motion challenging the jury pool as a violation of his right to a fair cross section of the community and requesting remedial measures pursuant to State v. Plain, 898 N.W.2d 801, 821

(Iowa 2017), Taylor v. Lousiana, 419 U.S. 522, 530 (1975), and Duren v. Missouri, 439 U.S. 357, 364 (1979). (Plain Motion 1/19/18)(App. p. 67). He alleged underrepresentation of Hispanics and African-Americans. (1/22/18 Trial Tr. p. 5 L. 6-16). The court denied Wilson's motion, concluding Wilson, as an African-American could not challenge underrepresentation of Hispanics. (1/22/18 Trial Tr. p. 3 L. 19-25; p. 16 L. 6 – p. 17 L. 4). The court further concluded, as to Wilson's claim of underrepresentation of African-Americans, he had not demonstrated that any underrepresentation was due to systematic exclusion of the group in the jury selection process. (1/22/18 Trial Tr. p. 18 L. 17 – p. 19 L. 14).

B. Standard of Review. Constitutional issues are reviewed de novo. State v. Plain, 898 N.W.2d 801, 810 (Iowa 2017).

C. Discussion. To establish a violation of the fair cross-section requirement, the defendant must meet a three part test:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

State v. Plain, 898 N.W.2d 801, 821 (Iowa 2017)(quoting Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979)). If the defendant establishes a prima facie case, the burden shifts to the State to justify the disproportionate representation by proving "a significant state interest" is "manifestly and primarily advanced" by the causes of the disproportionate exclusion. Plain, 898 N.W.2d at 822.

1. *The court erred in denying Wilson's motion as to the underrepresentation of Hispanics.* The court concluded Wilson could not raise a fair cross section claim that Hispanics were underrepresented in the jury pool because Wilson was not himself Hispanic. (1/22/18 Trial Tr. p. 19-25; p. 16 L. 6 – p. 17 L. 4). This was incorrect. See Taylor v. Louisiana, 419 U.S. 522, 526, 95 S.Ct. 692, 696 (1975)("Taylor was not a member

of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service."). See also Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163 (1972)(white defendant challenging exclusion of African-Americans from jury service).

2. *Wilson was unable to establish his prima facie case because he did not have access to historical jury data.* In support of his motion, Wilson submitted information on two prior jury pools in Polk County and the jury pool utilized in Wilson's own case. (Plain Motion Exs. 1, 2, 3; Trial Tr. p. 2 L. 9-16)(App. p. 72; Conf. App. pp. 4-44; 45-86). Everyone agreed that the African-American population of Polk County was 6.8%. (1/22/18 Trial Tr. p. 7 L. 15; p. 15 L. 24 – p. 16 L. 1). Wilson's jury pool consisted 3% African-Americans (3 out of a panel of 100 potential jurors). (1/22/18 Trial Tr. p. 7 L. 9-11; p. 13 L. 13 – p. 20). The prior panels consisted of 4.3% and 4.7% African-Americans. (Plain Ex. 3)(App. p. 72).

The State argued, in part, the jury data was insufficient to establish the third Duren prong—that the underrepresentation was due to systematic exclusion of the group. (State's Resistance 1/21/18; 1/22/18 Trial Tr. p. 14 L. 3 – p. 15 L. 7)(App. pp. 69-70). The State also submitted as an exhibit a ruling from another case in Polk County from August of 2017 indicating the court had considered six months of jury pool data in Polk County when it denied a motion to dismiss. (State's Addendum 1/21/18)(App. p. 71). When the court ruled on Wilson's motion, it concluded he had not met the third Duren prong, noting that he had not presented evidence about how jury pools were selected from the community or provided sufficient data to show "systematic underrepresentation." (1/22/18 Trial Tr. p. 18 L. 22 – p. 19 L. 14).

Wilson explained the reason he had data about only two prior jury pools:

> I know the State is going to criticize the amount of data we've used to draw our numbers. And I guess that's fair, but the numbers are not easy to get. We

> – I know the Court – we filed at 4:34 on Friday, but it took until about 3:00 on Friday before the jury – we could get any jury information out of the clerk here, and we had to pay out of pocket in order to get it. So there is a problem. It's not necessarily the County Attorney's fault or the clerk's fault, but the Supreme Court had made a ruling and says we have to address this. We have to look at it. And we have to talk about it. The fact that the processes are very difficult, I don't know that we can fix that problem. It's probably a problem much larger than us, in order for defendants to be allowed to have access to that information and for us to more appropriately challenge this with better statistical analysis and more data from – form the jury panels in the past. It doesn't exist. But the Supreme Court has made a ruling.

(1/22/18 Trial Tr. p. 9 L. 8-25).

"Defendants are entitled to access the information needed to enforce their constitutional right to a jury trial by a representative cross-section of the community." Plain, 898 N.W.2d at 828. In this case, Wilson was unable to "meet his prima facie case with respect to the third prong of the test, [because] he lacked the opportunity to do so because he was not provided access to the records to which he was entitled." Plain, 898 N.W.2d at 828.

Wilson had requested the historical jury data sometime in the ten days prior to the hearing. The district court expressed concern that Wilson had not given the clerk's office sufficient time to gather the data. (1/22/18 Trial Tr. p. 12 L. 19 – p. 13 L. 9). The timing of Wilson's request should not bar Wilson the opportunity to make his record. In Plain, the defendant apparently requested the historical jury data on the day trial was set to begin. See Plain, 898 N.W.2d at 827 ("I thought that she might be able to get me some statistics for the last six months. She says she can only print off today's panel in this courtroom."). This short notice did not prevent the court from remanding Plain's case to allow him to develop the record in order to make a prima facie case of underrepresentation. Plain, 898 N.W.2d at 828. Instead, the court noted, "In this case, Plain attempted to obtain the information he is entitled to receive. Because our statutes do not specify a procedure for accessing the information, he took what we view to be a reasonable approach—he asked the jury manager to provide it." Plain, 898 N.W.2d at 828. The same

is true in this case—there are no statutes providing for a different procedure for a defendant to follow to obtain the jury data. Plain had been decided six months before Wilson requested the data, putting the clerk's office/jury manager on notice of its constitutional obligation to make such historical data available.

D. Conclusion. Because Wilson "is entitled to access the information needed to enforce [his] constitutional right to a jury trial by a representative cross-section of the community," Wilson's convictions should be conditionally affirmed, and his case remanded "for development of the record on the Sixth Amendment challenge." See Plain, 898 N.W.2d at 829.

VI. Because the Department of Corrections is not statutorily authorized to give a sentencing recommendation, the sentencing court utilized an improper factor and abused its discretion in considering the PSI recommendation. Alternatively, counsel rendered ineffective assistance in failing to object to the PSI recommendation.

A. Preservation of Error: A defendant may raise the issue of the sentencing court's reliance on improper factors on direct appeal despite the absence of an objection in the trial

court. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); State v. Young, 292 N.W.2d 432, 434-35 (Iowa 1980) (improper factor claim reviewed despite lack of objection at sentencing). With regard to "portions of a presentence investigation report that are not challenged by the defendant" and are considered by the sentencing court, "if a defendant challenges a sentence claiming the court used an illegal factor in sentencing, a defendant need not object at sentencing for us to address the issue on appeal *if the issue can be decided without further evidence.*" State v. Gordon, --- N.W.2d ---, No. 17-0395, 2018 WL 6579109, at *4 (Iowa Dec. 14, 2018). The question is whether the court "needed more information" presented by way of an evidentiary record "to determine if the factor it considered was improper." Id. at *3. Because the PSI recommendation at issue here is "a factor whose illegality is clear without consideration of further evidence," the failure to object to the inclusion of a DCS recommendation in the PSI report does not preclude consideration of the issue directly

rather than under an ineffective assistance of counsel rubric. Id.

Alternatively, if error is not preserved on this issue, trial counsel provided ineffective assistance for failing to object to this portion of the Presentence Investigation Report (PSI). See State v. Witham, 583 N.W.2d 677, 678 (Iowa 1998)(explaining that district court was free to consider the portions of the presentence investigation report which were not challenged by defendant). Counsel's failure to preserve error deprived Wilson of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Ineffective assistance of counsel claims provide an exception to the normal rules of error preservation. State v. Ondayog, 722 N.W.2d 778, 783 (Iowa 2006).

B. Standard of Review: Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 6.907; State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review

unless the defendant demonstrates an abuse of trial court discretion of a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." Witham, 583 N.W.2d at 678; State v. Sailer, 587 N.W.2d 756, 762 (Iowa 1998).

Review of ineffective assistance of counsel claims is de novo. Ondayog, 722 N.W.2d at 783.

C. Discussion: The Presentencing Investigation Report submitted to the sentencing court concluded with a "Sentencing Recommendation." The recommendation section recommended the imposition of prison terms on all four counts, and concluded, "the serious nature of the offense and the harm to the victims warrant incarceration." (PSI p.10) (Conf. App. p. 141).

During the sentencing hearing, defense counsel noted certain substantive corrections to the PSI report, but did not object to the inclusion of a recommendation by the Department of Correctional Services. (Sent. Tr. p. 45 L. 13-24). Ultimately, the court imposed prison terms on all four counts

and ordered all sentences to run consecutively, for a total of twenty-four years. (Sent. Tr. p. 58 L. 10 – p. 59 L. 18). The court explained that the reasons for imposing terms of incarceration and reasons for imposing consecutive sentences were the same. (Sent. Tr. p. 60 L. 24 – p. 61 L. 6). The court noted that there were separate victims in counts II and III, that they were violent offenses, and noted the circumstances of the offenses—shooting into a crowd at a busy pedestrian mall. (Sent. Tr. p. 61 L. 7-17). The court also expressed concern that Wilson had not expressed remorse for his actions, even if he believed he acted in self-defense. (Sent. Tr. p. 61 L. 18 – p. 62 L. 1). The court noted, "*The presentence report recommends incarceration and prison on all charges.*" (Sent. Tr. p. 62 L. 2-3).

The sentencing court thus explicitly stated that it took into consideration the recommendation in the presentence report. (Sent. Tr. p.62 L. 2-3). But, because there is no authority for the Department of Correctional Services to provide a sentencing recommendation to the court, the district

court's consideration of the PSI recommendation was improper and requires resentencing.

1. No authority for "recommendation" in PSI: The authority for the completion and use of a PSI is found in Iowa Code §§ 901.2 and 901.3 (2017). Section 901.2 provides:

> 1. Upon a plea of guilty, a verdict of guilty, or a special verdict upon which a judgment of conviction of a public offense may be rendered, the court shall receive from the state, from the judicial district department of correctional services, and from the defendant any information which may be offered which is relevant to the question of sentencing. The court may consider information from other sources.
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> ***
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> 3. The court may withhold execution of any judgment or sentence for such time as shall be reasonably necessary for an investigation with respect to deferment of judgment, deferment of sentence, or suspension of sentence and probation. The investigation shall be made by the judicial district department of correctional services.
>
> 4. The purpose of the report by the judicial district department of correctional services is to provide the court pertinent information for purposes of sentencing and to include suggestions for correctional planning for use by correctional authorities subsequent to sentencing.

Iowa Code § 901.2 (2017). Section 901.3 provides:

If a presentence investigation is ordered by the court, the investigator shall promptly inquire into all of the following:

a. The defendant's characteristics, family and financial circumstances, needs, and potentialities.

b. The defendant's criminal record and social history.

c. The circumstances of the offense.

d. The time the defendant has been in detention.

e. The harm to the victim, the victim's immediate family, and the community. Additionally, the presentence investigator shall provide a victim impact statement form to each victim, if one has not already been provided, and shall file the completed statement or statements with the presentence investigation report.

f. The defendant's potential as a candidate for the community service sentence program established pursuant to section 907.13.

g. Any mitigating circumstances relating to the offense and the defendant's potential as a candidate for deferred judgment, deferred sentencing, a suspended sentence, or probation, if the defendant is charged with or convicted of assisting suicide pursuant to section 707A.2.

h. Whether the defendant has a history of mental health or substance abuse problems. If so, the investigator shall inquire into the treatment options available in both the community of the defendant and the correctional system.

> 2. All local and state mental and correctional institutions, courts, and police agencies shall furnish to the investigator on request the defendant's criminal record and other relevant information. The originating source of specific mental health or substance abuse information including the histories, treatment, and use of medications shall not be released to the presentence investigator unless the defendant authorizes the release of such information. If the defendant refuses to release the information, the presentence investigator may note the defendant's refusal to release mental health or substance abuse information in the presentence investigation report and rely upon other mental health or substance abuse information available to the presentence investigator. With the approval of the court, a physical examination or psychiatric evaluation of the defendant may be ordered, or the defendant may be committed to an inpatient or outpatient psychiatric facility for an evaluation of the defendant's personality and mental health. The results of any such examination or evaluation shall be included in the report of the investigator.

Iowa Code § 901.3 (2017).

Iowa Code §§ 901.2 and 901.3 do not explicitly provide for DCS to make a recommendation to the district court regarding a defendant's sentence. Cf. Iowa Code § 901.3(1)(f) (2017) (potential as candidate for community service); § 901.3(1)(g) (2017) (if charged with assisted suicide defendant's

potential as a candidate for deferred judgment or sentence, or suspended sentence and probation).

The statutes provide the court shall receive from the Department of Correctional Services "any *information* which may be offered which is *relevant* to the question of sentencing." Iowa Code § 901.2(1) (2017) (emphasis added). The purpose of the report is to provide "pertinent information" for purposes of sentencing. Iowa Code § 901.2(4) (2017). See also State v. Brown, 518 N.W.2d 351, 352 (Iowa 1994); State v. Uthe, 541 N.W.2d 532, 533 (Iowa 1995). Thus, the determination of whether there is statutory authority for a sentencing recommendation hinges on whether such a recommendation is properly considered "relevant information" or "pertinent information."

"Relevant" means "having appreciable probative value -- that is, rationally tending to persuade people of the probability or possibility of some alleged fact." Black's Law Dictionary (10th ed. 2014). "Pertinent" means "[o]f, relating to, or involving the particular issue at hand; relevant." Black's Law

Dictionary (10th ed. 2014). "Information" means "1: the communication . . . of knowledge or intelligence; 2a(1): knowledge obtained from investigation, study, or instruction (2): intelligence, news (3): facts, data." "Information." Merriam-Webster.com, available at https://www.merriam-webster.com/dictionary/information.

Thus, the "information" DCS provides to the sentencing court as outlined in Iowa Code § 901.3 is relevant or pertinent to the district court's sentencing decision. The Department of Correctional Services is tasked with gathering information about the defendant and is in a position to inform the court what correctional and other community-based services are available. The factual contents of the report help inform the court's decision. But the DCS's *opinion* regarding what sentence should be imposed is not relevant to the ultimate sentencing decision and is not "information." The district court is fully capable of considering the factual information contained in the PSI and exercising the sentencing discretion as required by law. See Iowa Code § 901.5 (2017)

(pronouncing judgment); Iowa Code § 907.5 (2017) (sentencing factors).[6] The unauthorized recommendation only runs the risk of carrying the aura of expertise which is unwarranted. The Department of Correctional Services does not provide an opinion which the district court is not capable of making itself based on the factual information provided in the PSI. Further, because the DCS recommendation was not authorized by statute, it unfairly allowed the government to give two sentencing recommendations rather than the one offered by the prosecutor.

The opinion of the Department of Correctional Services is not relevant to the question of sentencing. The legislature has not authorized the Department of Correctional Services to

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[6] Appellant recognizes that many Supreme Court decisions reference the recommendation made in the PSI. The inclusion of the Department of Correctional Services (DCS) recommendation appears to be a historical practice. See e.g. State v. Waterman, 217 N.W.2d 621, 623 (Iowa 1974) ("It is the trial court's use of the presentence investigation report once it was received which defendant attacks in this appeal. He argues the trial court did not use the presentence investigation merely as one of many sources of information but rather as the only source.").

make a recommendation for sentencing in the PSI. The sentencing court's consideration of the DCS recommendation is a procedural defect in the sentencing process.

The error prejudiced Wilson. The district court explicitly stated that it took into consideration the recommended sentence of the Department of Correctional Services in selecting the sentence and deciding to run the sentences consecutively. (Sent. Tr. p.62 L. 2-3).

If the sentencing court "uses any improper consideration, resentencing of the defendant is required." State v. Grandberry, 619 N.W.2d 399, 401 (Iowa 2000). The appellate court will not speculate about the weight the sentencing court assigned to any given factor or try to divine which factor tipped the scales toward incarceration. Resentencing is required even if the troubling factor was "merely a 'secondary consideration.'" Id. (quoting State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981)). The proper remedy is to remand for resentencing before a different judge. State v. Lovell, 857 N.W.2d 241, 243 (Iowa 2014).

The error infected the entire sentencing proceeding. Barker is entitled to a fair sentencing hearing where the court exercises its discretion according to the law enacted by the legislature. Wilson's sentence must be vacated and remanded for a new sentencing hearing before a different district court judge. Cf. Lovell, 857 N.W.2d at 243.

2. Ineffective Assistance of Counsel Alternative: If error was not preserved, counsel provided ineffective assistance. A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, §10; Strickland, 466 U.S. at 686, 104 S.Ct. at 2063. The test for determining whether a defendant received effective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In order to establish ineffective assistance of counsel, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been

different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Defense counsel breached an essential duty by failing to object to inclusion of a recommendation in the PSI. Trial counsel had a duty to preserve error and notify the court of any inappropriate information in the PSI. As argued above, there is not statutory authority for DCS to make a sentencing recommendation. A plain reading of the relevant statutes reveals the lack of authority for DCS to make a sentencing recommendation. Counsel should have been familiar with the sentencing statutes when representing a criminal defendant. State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999).

Wilson was prejudiced by counsel's failure. The district court explicitly considered the PSI recommendation in selecting terms of incarceration and in ordering the sentences to run consecutively. (Sent. Tr. p.62 L. 2-3). The error infected the entire sentencing proceeding. Wilson is entitled to a fair sentencing hearing where the court exercises its

discretion according to the law enacted by the legislature. Had counsel objected to authority for the DCS to make a sentencing recommendation, the sentencing proceeding would not have contained the error. Cf. State v. Carrillo, 597 N.W.2d 497, 501 (Iowa 1999)("A proper objection by counsel [to State's breach of plea agreement at sentencing] would have led to a 'different outcome' in the sense that [Defendant] would either have been allowed to withdraw his plea, or he would have been entitled to a resentencing in proceedings not tainted by the State's recommendation."); State v. Horness, 600 N.W.2d 294, 300-301 (Iowa 1999)(similarly holding). Wilson's sentence must be vacated and remanded for a new sentencing hearing before a different district court judge. Cf. Lovell, 857 N.W.2d at 243.

D. Conclusion: Because the district court considered an improper factor when it sentenced Wilson, Wilson's sentences should be vacated and his case remanded for resentencing before a different judge.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $7.46, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 13,939 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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